

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

Re: OMYA, Inc. and Foster Brothers Farm, Inc.
#9A0107-2-EB
~~XXXXXXXXXX~~

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to an appeal and cross-appeal **from** Land Use Permit #9A0107-2 issued to OMYA, Inc. ("**Omya**") and Foster Brothers Farm, Inc. (collectively "**Permittees**") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250") authorizing an increase in the number of daily truck trips **from the Permittees'** Middlebury, Vermont quarry. Specifically, the appeal concerns conformance with 10 V.S.A. §§ 6086(a)(5) (traffic), (7) (governmental services), (8) (aesthetics and historic sites), and (9)(K) (public investment / enjoyment) ("**Criteria 5, 7, 8, and 9(K)**") respectively).

As explained below, the Environmental Board ("Board") concludes that, as conditioned, an increase in the number of daily truck trips **from** the current limit of 85 round trip truck trips per day to a maximum of 115 round trip truck trips per day will not violate Act 250. A total of 115 round trips per day is acceptable because it distributes the truck traffic in such a way that it will blend in with the existing truck traffic and with the existing nature of **Brandon** Village. The requested increase to 170 round trips, twice the current permitted amount, would unduly exacerbate the current situation by tipping the delicate balance in **Brandon** to favor use of U.S. Route 7 at the expense of the historic and aesthetic character of **Brandon** Village.

OMYA has not demonstrated an immediate need for the requested additional truck trips nor has it indicated whether, if granted the additional trips, it would utilize them within the next several years. The Board believes that OMYA, the Vermont Agency of Transportation, the Vermont Agency of Commerce and Community Development, the Vermont Agency of Natural Resources, the Conservation Law Foundation, and Vermont Railway, Inc. should continue to pursue the feasibility of mitigation measures such as further investigation of the rail alternatives addressed in the studies authorized by the Vermont Legislature.

I. BACKGROUND

On July 8, 1998 the District #9 Environmental Commission ("Commission") issued Land Use Permit #9A0107-2 ("Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Decision") to Permittees.

The Permit authorizes the **Permittees** to increase the number of daily truck trips from the **Permittees'** Middlebury quarry **from the** current limit of 85 round trip truck trips

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

Page 2

per day to a maximum of 113 round trip truck trips per day, phased in over a two year period ("Project"). Permittees had sought permission to eliminate the restrictions on truck traffic, estimating that it would need to make 170 round trips per day.

On July 10, 1998 OMYA filed a Motion to Alter the Permit and Decision. On August 6, 1998 the Commission denied OMYA's Motion to Alter the Permit and Decision.

On September 2, 1998 OMYA filed an appeal with the Board.

On September 4, 1998 the Town of Pittsford and the Town of Pittsford Planning Commission ("Pittsford") filed a cross-appeal with the Board.

On September 23, 1998 the Vermont Agency of Transportation ("AOT") filed its Notice of Appearance.

On October 5, 1998 the Town of Brandon Planning Commission filed a letter with the Board with respect to its party status in this appeal.

On October 6, 1998 Stephanie J. Kaplan, Esq., filed her Notice of Appearance on behalf of Michael and Melanie Shane ("Shane"), Norman and Ginette Milot ("Milot"), and Louis and Sarah Pattis ("Pattis"). Shane, Milot, and Pattis are referred to collectively herein as the "Innkeepers."

On October 7, 1998 the Vermont Agency of Commerce and Community Development ("ACCD") filed its Notice of Appearance.

On October 7, 1998 Board Chair Harding convened a prehearing conference and, on October 9, 1998, issued a Prehearing Conference Report and Order ("Prehearing Order #1").

On October 28, 1998 the Board deliberated with respect to party status and the issues on appeal.

On October 30, 1998, the Board issued Re: OMYA, Inc. and Foster Brothers Farm, Inc., Application #9A0107-2-EB, Order (Oct. 30, 1998) ("Order #1").

During December 1998 the parties filed prefiled evidence, proposed findings of fact and conclusions of law, and evidentiary objections.

On January 4, 1999 Acting Chair John T. Ewing convened a second prehearing conference and, on January 5, 1999, issued a Second Prehearing Conference Report and Order ("Prehearing Order #2").

On January 12, 1999 the Board convened a deliberation regarding the parties' respective objections to Prehearing Order #2.

On January 13, 1999 the Board convened a hearing in this appeal with the following parties participating:

OMYA, Inc. by Edward V. Schwiebert, Esq.
Pittsford by Jon S. Readnour, Esq.
Innkeepers by Stephanie J. Kaplan, Esq.
ACCD by John W. Kessler, Esq.

On January 13, 1999 the Board recessed the hearing.

On January 19, 1999 Acting Chair Ewing issued Re: OMYA, Inc. and Foster Brothers Farm, Inc., Application #9A0107-2-EB, Order (Jan. 19, 1999)("Order #2").

On January 29, 1999 the parties filed a stipulation ("Stipulation"). Based on the Stipulation, the Board canceled the planned resumption of the hearing in this matter as provided for in Order #2.

On February 2, 3, 4, and 5, 1999 the parties filed supplemental proposed findings of fact, conclusions of law, and order, motion to alter, and/or response to motion to alter..

On January 29, 1999, March 24, 1999, April 28, 1999, and May 19, 1999, the Board deliberated regarding this appeal. On May 19, 1999, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent that any proposed findings of fact are included within, they are granted; otherwise, they are denied. See Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corporation, 167 Vt 228,241 (1998); Petition of Village of Hardwick Electric Department, 143 Vt. 437,445 (1983).

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

Page 1

II. ISSUES

As stated in Order #1, the issues on appeal are as follows:

1. Whether the Board's jurisdiction over OMYA truck traffic within the Brandon Urban Compact is preempted by the Commerce Clause, the Equal Protection Clause, or the Supremacy Clause of the U.S. Constitution, or their respective counterparts in the Vermont constitution?
2. Whether the Board lacks jurisdiction over OMYA truck traffic within the Brandon Urban Compact because the District #9 Environmental Commission lacked jurisdiction over such traffic as part of its consideration of Land Use Permit Application #9A0 107-2 insofar as such traffic results from the activities authorized by Land Use Permit #9A0 107-3 issued on November 19, 1997?
3. Whether the District #9 Environmental Commission, and, therefore, the Board, is collaterally estopped by the Land Use Permit #1R0271 series such that conditions 11, 12, and 13 of the Permit should be made void by the Board's issuance of a land use permit amendment?
4. Whether, pursuant to 10 V.S.A. § 6086(a)(5), the Project will cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed?
5. Whether, pursuant to 10 V.S.A. § 6086(a)(7), the Project will place an unreasonable burden on the ability of the local governments to provide municipal or governmental services?
6. Whether, pursuant to 10 V.S.A. § 6086(a)(8), the Project will have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas'?
7. Whether, pursuant to 10 V.S.A. § 6086(a)(9)(K), the Project, if it is adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, will unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the

function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands?

III. FINDINGS OF FACT

1. OMYA owns and operates a calcium carbonate quarry in Middlebury, Vermont. The material extracted from the quarry is transported by truck **from Middlebury** to OMYA's Verpol processing plant in Florence, Vermont, where it is processed and shipped out by truck and rail.
2. OMYA's permit amendment application before the Commission pertained to: (i) the continued operation of the quarry; and (ii) the construction of an access drive to U.S. Route 7. At OMYA's request, the Commission separated these two activities into two separate permit amendment proceedings.
3. The Land Use Permit **#1R027** 1 series are not in evidence before the Board. No party has requested that official notice be taken of the Land Use Permit **#1R0271** series. The Land Use Permit **#1R0271** series authorize the construction and operation of OMYA's Verpol processing plant. OMYA has other quarries besides the Middlebury quarry that could provide feed stone to the Verpol processing plant.
4. OMYA provides in excess of \$1.5 million in annual taxes to the Town of Pittsford.. The tax revenues received by the Town of Pittsford more than offset any impact on the Town of **Pittsford**. OMYA has regularly assisted the Town of Pittsford to provide infrastructure improvements made necessary by the Project. This assistance has included engineering services for road maintenance and contributions toward road repair.
5. OMYA has contracts with two trucking companies to haul its material from Middlebury to Florence: L.F. Carter, Inc. and **Dido** Trucking. The trucks are 22-24 tons, and have five axles and 18 wheels. The trucks are driven from the quarry in Middlebury south on Route 7 through the Village of **Brandon**. Empty trucks take the same route back to Middlebury from Florence along Route 7.
6. U. S. Route 7 is one of ten highway segments in Vermont designated as part of the National Highway System whose purpose is the transportation of goods in interstate commerce, That designation was achieved. in part, based upon the recommendations and comments of the State of Vermont and the towns served by U. S. Route 7, including Brandon.

7. National Highway System ("NHS") roads are federally designated as the most important roads in the state for, among other things, interstate commerce. In Vermont, Route 7 shares this designation with the Vermont interstate system and with much of U.S. Routes 2 and 4 and Vermont Routes 9, 78, and 103.
 8. Route 7 through **Brandon** Village is a **two lane** road. Route 7 through **Brandon** Village is not designed to be, nor does it function as, an interstate highway like Interstates 91 or 89.
 9. L. F. Carter, Inc. maintains an employee manual that requires its drivers to conform to safe, careful, and courteous driving standards and imposes severe punishment, including immediate termination, for failure to comply. In addition, its drivers undergo safety training. Those same procedures and training are required of the drivers employed by **Dido** Trucking.
 10. The trucks transporting ore for **OMYA** travel through the Town of **Brandon** at the legal and recommended speed limits (15 mph at the Bank corner in the center of town). The vibrations generated by the trucks do not cause physical damage to the historic sites located within the **Brandon** Village Historic District.
 11. The trucks transporting ore for **OMYA** are **fully** licensed and equipped and have no problem stopping suddenly because they maintain a prudent speed -- within **the limits set and** recommended for travel in the Village. Because the **drivers** sit high above the road, truck drivers have a better field of vision than drivers of cars.
 12. L. F. Carter, Inc. has never had an accident within the **Brandon** urban compact. None **of its** drivers has caused a fatal accident, and its accident safety record is better than the national and regional **norms**. That record is attributable to the company's strict policies, to its careful attention to and enforcement of those policies, and to the fact that its drivers not **only** drive, but also live, within the region.
 13. Supervisory personnel drive the route regularly between the plant in Florence and the **Middlebury** Quarry. All of L. F. Carter's and **Dido's** trucks are equipped with two-way radios, so the drivers can alert each other to driving conditions on the road ahead. The two-way radios **also permit ready** communications with a driver **if the driver** has been observed to be engaging in **what** might be unsafe or improper driving. L. F. Carter rarely **has** to reprimand a driver, but, when the need may **arise**, it does not hesitate to issue an immediate warning followed by proper discipline.
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14. L. F. Carter trucks never have been stopped, warned, or cited for a speeding violation. The trucks transporting ore, for OMYA operate through **Brandon** at or below the posted speed limit (25 MPH) and stop for pedestrians in cross walks.
15. The trucks transporting ore for OMYA move to allow emergency vehicles to pass and, utilizing their radios, inform other truck drivers of emergency situations ahead.
16. The trucks transporting ore for OMYA leave from three different shops. Each shop is located several miles **from** the other and the trucks leave each shop at ten minute intervals. The trucks are dispatched to achieve a space between them and to avoid convoying, but "bunching" of trucks does occur.
17. The transportation policy is not to convoy. Not only does convoying have the potential to disturb people, it serves no purpose. Only so many trucks can be loaded over a limited period, so it makes no sense to convoy the trucks and then have them sit idly waiting to be loaded. Also, **trucks** cannot unload all at once. From a purely practical point of view, the trucks are spaced out to achieve efficiencies in operation. In addition, the trucks try to avoid high or peak periods of traffic, so there is variability in the flow of movement throughout the day.
18. There are alternate routes which would avoid the use of Route 7 through the Village of **Brandon**. OMYA has not specifically investigated the various potential alternative routes. OMYA prefers Route 7 because it is the most **direct**. Using these alternate routes for all or some of the additional truck trips would mean driving through communities other than **Brandon**.
19. In 1981, OMYA obtained a land use permit that allowed 85 round trips per day, or a total of 170 truck trips. That permit provides that all truck trips must be made between the hours of 6:00 a.m. and 8:00 p.m. Monday through Saturday, and on five Sundays per year.
20. OMYA applied for a permit to expand its quarry in Middlebury and to construct a new access road from the quarry to Route 7. As part of this application. OMYA requested that the 85 truck round trip limit be lifted.
21. OMYA estimates it will need 170 round trips or 340 truck trips per day, but is not seeking any maximum limit of trucks. At OMYA's request, the District #9 Commission bifurcated the hearing and issued a permit that allowed construction

of the access drive and other development prior to reviewing the application for an increase in permitted trucks.

22. OMYA's trucks currently run from 6:00 am. to approximately 3:00 p.m. If there is no limit on truck trips, OMYA will run trucks until 8:00 p.m., but will limit the number of truck trips between 3:30 and 5:00 p.m., the time during which the highest volume of traffic travels in Brandon Village.
23. OMYA is currently operating at the rate of 98 round trips, or 196 one-way trips, from the Middlebury Quarry. OMYA believes that at some point in the future it will need the requested increase of 85 trucks per day (170 round trips) to meet the full demand at the Middlebury Quarry. OMYA cannot predict how many more trucks it will need each year over the next five years. It is possible, although "improbable," that Omya will need the entire amount of the increase within the next few years. The number of trucks it will need will depend upon the market demand for its product. Because the Middlebury quarry has superior quality ore, OMYA expects that the demand will continue and increase.
24. If OMYA is not authorized to increase truck traffic as requested, it will not close the Middlebury Quarry, but will continue to operate at the present rate of production.
25. An increase in trucks of the magnitude proposed by OMYA will substantially exacerbate the noise, pollution, congestion, and other problems that are caused by the existing truck traffic in Brandon. The increased truck traffic affects the ability of some Brandon residents to enjoy the quality of life that Brandon has to offer.
26. If OMYA's truck traffic is increased to 340 truck trips per day between the hours of 6:00 am. to 8:00 p.m., an OMYA truck will pass through Brandon on average every 2.5 minutes (340 trips in 840 minutes).
27. Based on traffic counts conducted by Michael Shane and Louis Pattis on December 11, 1998. between the hours of 5:45 a.m. and 3:00 p.m. there were 230 OMYA trucks. while during those same hours there were 677 trucks from other sources. OMYA's trucks accounted for 25.4% of all trucks during those hours.
28. There are fourteen hours between the hours of 6:00 a.m. and 8:00 p.m. OMYA has agreed that during the hours of 3:30 p.m. until 5:00 p.m. it will limit its truck traffic to a total of 21 round trips. OMYA's truck drivers also take a half-hour lunch.

29. Based on the December 11, 1998 traffic count, the total truck trips from all sources is 907 trucks.. An additional 30 round trips added to the existing authorized 85 round trips yields 115 round' trips in the thirteen and one-half hour period between 6:00 a.m. and 8:00 p.m. (allowing one-half hour for lunch). If the 115 round trips are spread out evenly over this 8 10 minute period, then OMYA would operate up to one one-way truck trip every three and one-half minutes, or 17 one-way truck trips per hour. This is in contrast to the current authorized level of one one-way truck trip every four and three-quarter minutes.
30. Kenneth Kaliski of Resource System Group ("RSG"), OMYA's traffic consultant, conducted a traffic study and submitted a report. He concluded that 170 additional truck trips per day would not cause congestion in Brandon. RSG did not analyze the Level-of-Service ("LOS") at important intersections and streets that intersect with Route 7 in Brandon.
31. LOS is a qualitative measurement describing the operating conditions as perceived by motorists driving in a traffic stream. There are six grades to describe the LOS at an intersection. LOS is based on the stopped delay per vehicle. The following table shows the various LOS grades, qualitative descriptions, and quantitative definitions for unsignalized intersections.

LOS CHARACTERISTICS		UNSIGNALIZED TOTAL DELAY (sec)
A.	Little or no delay	<= 5.0
B	Short delays	5.1-10.0
C	Average delays	10.1-20.0
D	Long delays	20.1-30.0
E	Very long delays	30-1-45.0
F	Extreme delays	45.0

32. LOS also can describe the operating conditions on a rural highway. LOS reflects how much of the road's capacity is used during a certain period. In Vermont, the AOT's policy is to design for LOS C when building new roads and intersections. Lower levels of service can be acceptable under certain conditions. These conditions include whether the area is urban or rural, what actual delays are experienced, the volume to capacity ratio, and the negative impacts that may result to the surrounding area because of improvements that would be required to achieve LOS C.

33. It is the policy of the State of Vermont ~~that, prior to the~~ implementation of any travel demand management strategies or alternative transportation measures, all traditional **traffic** engineering approaches should be explored, including installation of a signal, adjustment to signal ~~phasing~~, modification to ~~existing lane~~ configurations, etc.
34. The peak period limit on number of trucks lessens the potential impact of the quarry expansion on all of the communities along Route 7 during the afternoon peak **traffic** period. In **Brandon**, for example, the peak hour of traffic is between 3:30 p.m. and 4:30 p.m. The limits on truck trips imposed at the **Middlebury quarry** between 3:30 p.m. and 5:00 p.m. would limit truck traffic during Brandon's peak period, as well.
35. RSG analyzed the LOS for through-traffic on Route 7. RSG did not analyze the delay that is currently experienced by **people or cars** that are on the side streets **and** it did not analyze the impact of the additional 170 trucks per day that will be driving through **Brandon**.
36. RSG did not consider that there are **two unsignalized** side streets in **Brandon** that **were** experiencing LOS E or F several years ago for several of the turning movements. RSG did not consider that a substantial amount of the **traffic** in **Brandon** is due to people trying to turn onto Route 7 **from** the side streets, and that their ability to turn will be affected by additional **trucks** on Route 7.
37. A **Route 7** corridor study was done in 1994 or 1995 by Wilbur Smith Associates. The purpose was to identify problems in the Route 7 corridor, identify methods of **correcting the** problems, and estimate the cost of correcting them. That study identified deficient conditions at the intersection of Routes 73 and 7 (LOS E) and at the intersection of Carver Street and Route 7 (LOS F).
38. Rist-Frost is a consulting firm that was hired by AOT to ~~assess the~~ transportation problems in **Brandon** and Pittsford Villages and to find a solution for problems identified. The section in the Rist-Frost report entitled "Purpose and Need Statement for **Brandon**" contains the following statements:

Vermont Route 73 intersects U.S. Route 7 **from** the west near the **northern** project limit and from the east immediately south of the business district. The vehicular turning movements and pedestrian crossing activity, found at these two U.S. Route 7/Vermont Route

73 intersections, restrict traffic flow and adversely impact safety at these locations.

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The convolution of peak hour traffic from U.S. 7 and Vermont Route 73 congests the corridor resulting in long delays for side street access to and from Vermont Route 73.

39. In 1992, RSG prepared a study for the Grand Union in **Brandon** that was based on modeling that showed a LOS of E for certain **turning** movements at the Carver Street/Route 7 intersection and a LOS F for certain turning movements at the Union Street/Route **73/Route 7** intersections. RSG often does traffic studies based upon modeling. There is no evidence that shows the actual conditions at those intersections more recently than 1992.
40. In spite of the previous findings of several studies that the two unsignalized intersections in **Brandon** experienced LOS E and LOS F, Ken Kaliski testified that they were LOS A. He did not provide the LOS for the individual approaches at the intersections. An overall LOS is not meaningful when trying to determine the functioning of an intersection. For unsignalized intersections, the individual approaches must be analyzed and reported as well.
41. An increase in truck traffic on Route 7 in downtown **Brandon** will make it more difficult for vehicles to turn **left from** the side streets onto Route 7 or to cross Route 7.
42. The AOT witnesses are aware that there may be congestion problems in downtown **Brandon**, but they cannot identify the nature of these problems. They did not require or suggest that OMYA study the **traffic** situation in **Brandon**, even though they are aware that problems have been identified in previous studies. The AOT did not require a study because they do not believe that an additional 170 trucks per day driving through **Brandon** will cause any additional congestion or delays, even at the unsignalized intersections which were found in previous studies to have LOS E and LOS F for some turning movements.
43. Even without a traffic study to show the existing levels of service of the turning movements at the unsignalized intersections in **Brandon Village**, it is AOT's **opinion** that additional trucks from OMYA will not change their levels of service.

44. AOT's LOS policy provides that LOS C should be maintained, except a reduced LOS may be appropriate in some circumstances when approved by the Secretary of AOT on a case by case basis. The Secretary of AOT has not approved a lower LOS for any of the intersections in Brandon.
45. The roadbed underlying Route 7 through Brandon is made of jointed concrete panels approximately 20 feet in length. The shifting of the concrete panels in the roadbed causes deflection of the asphalt surface paving materials which, in turn, regularly causes cracking of the road surface.
46. Due to cold weather, the concrete shrinks, and the asphalt on top is insufficiently strong to resist that movement of the slab. The asphalt layer cracks, right above the joints in the concrete, which are about 40 feet apart. Once the asphalt cracks, it is permeated with moisture which causes further deterioration of the road surface.
47. There is no plan to remove the old roadbed. As a result, the cracking at the ends of each of the panels will recur. This has happened on Route 7 in front of the Rosebelle Victorian Inn.
48. The road surface on Route 7 through Brandon Village was resurfaced during the summer of 1998. That was the first time it had been repaved for approximately 25 years. However, no repairs or improvements were made to the underlying concrete.
49. The road surface that was repaved in 1998 was showing cracks in January 1999. The cracks are approximately 1/2 inch wide and will continue to widen throughout the winter. The cracks are in exactly the same places they were before the road was repaved.
50. The AOT is responsible for maintaining Route 7 through Brandon Village. AOT has no plans for resurfacing it again. It Will be at least another three years before it is resurfaced.
51. Before the road was resurfaced in 1998, the noise of the empty OMYA trucks as they drove over the cracks was extremely loud and disruptive. Every time an empty truck drove over the cracks there was a loud "boom."
52. The unloaded OMYA trucks returning from Florence to Middlebury generate considerable noise and vibration as they drive over the cracks in the road. Loaded

trucks also generate noise and vibration as they pass over the cracks. Even with the repaving of the road, the trucks generate considerable noise. The motors are noisy. Loud noises are generated every time a truck shifts or puts on its brakes. As trucks drive through **Brandon**, they have to negotiate several curves, requiring the drivers to shift as they drive through town.

53. The **Brandon** IM is located at the junction of Routes 7 and 73 (Park Street). It is owned and operated by Louis and Sarah Pattis, who live beside the Inn on Park Street. They purchased the IM eleven years ago.
54. The **Brandon** IM is on the National Register of Historic Places. It has been operated continuously as an inn since 1786, except for when it was being rebuilt after a fire in 1881. The IM has 37 bedrooms, a dining room, and several meeting rooms. The IM is open year round and serves dinner to guests and the public. Until last summer the IM was also open for lunch.
55. The truck traffic disturbs guests of the **Brandon** IM. The noise and vibrations are the most disturbing. OMYA truck traffic commences at 6:00 a.m. when most guests are still sleeping. Of the 37 guest rooms, 19 are very noisy, six are moderately noisy, and only 12 are quiet. The guests in rooms across the front of the Inn and some on the sides and back are awakened when the truck traffic starts at the beginning of the day.
56. It is unpleasant to be outside during the day when the truck traffic is heavy. The IM used to serve lunch outside on the terrace. It discontinued the use of the terrace during lunchtime because the noise from the trucks made conversation difficult and the dust, dirt, and exhaust fumes were unpleasant. Even the dining room is affected in the summer. The windows of the IM need to be opened in the summer because the IM is not air conditioned. The windows are kept shut as much as possible, however, to lessen the noise caused by truck traffic.
57. Noise from the trucks is most problematic when the trucks start their operations at 6:00 a.m. Most of the guests of the **Brandon** IM are sleeping then, and they are awakened by the noise and vibrations from the trucks. Currently, OMYA's trucks usually don't run after 3:00 p.m., although their permit allows the trucks to operate until 5:00 p.m.
58. Dust and dirt are increasingly evident on the stone facade and paint of the **Brandon** Inn. I t has to be hosed off on the glass tables outside, and they have to be washed every day.

59. Michael and Melanie Shane own and operate the Lilac Inn on Park Street in **Brandon**, approximately 2/10 of a mile **from** the intersection of Park Street and Route 7. They live in a cottage behind the Inn, and their back yard and **gardens** are about 300 feet from Route 7.
60. The Lilac Inn is a 1909 historic district **registered** mansion. The Inn is situated on a two acre parcel bordered to the **north** by Park Street (Route 73) and on the south by the parking lot of Miller and **Ketchum** Funeral Home on Route 7. The property and gardens have been developed to offer indoor and outdoor **receptions** and events to the public. accommodations to travelers, and ding to the **public**.
61. Norman and Ginette Milot own and operate Rosebelle's Victorian **Inn** on Route 7, approximately 3/10 of a **mile** south of the center of **Brandon** Village. The Inn is a French Second Empire mansard with slate roofing and cedar siding. It is on the National Register of Historic Places.
62. The truck **traffic** negatively affects the guests at Rosebelle's Victorian **Inn**. The trucks cause vibrations that shake the Inn every time they drive past. Noise **from** the trucks is a constant intrusion. Many **of the** guests complain of the vibration and noise of the trucks. Guests like to use the yard for sitting and relaxing, playing lawn games, reading, or **having** a cook-out, but the trucks interfere with these **activities**. Guests have to keep their room windows closed to lessen the noise of the trucks. Some guests have difficulty sleeping. The Milots **always** **warn** the **guests** about the vibrations **from** the trucks passing by.
63. The **Milots** must close their windows on the Route 7 side to keep **fumes** and odors out. Noise **from** the trucks makes it difficult to hold a conversation outside. Their computer is located on the third floor rear southwest corner of their home and when working there they can feel the vibrations from the trucks. The siding on the Inn turns black **from** the truck exhaust and they have to wash the outside of the building every spring.
64. The Village of **Brandon** is an historic district with 245 buildings listed on the National Register of Historic Places. **Many** of these buildings are located along Route 7.
65. **Between** 10,000 and 11,000 vehicles drive through **Brandon** each day. The total number of **trucks** is approximately 9% Of that. or approximately 907 per day. **Based on the** truck count taken by Michael Shane between 5:45 a.m. and 3:00 p.m.. 25.4% of the trucks were OMYA's. When OMYA's witness Terry Boyle

performed a truck count, he found that 42.6% of the truck traffic between 6:00 a.m. and 9:00 a.m. consisted of **OMYA's** trucks.

66. In 1996, AOT conducted two traffic counts at the VT **73/Route 7/Union Street** intersection in downtown **Brandon** between 6:00 a.m. and 6:00 p.m. During this period they counted 8,135 vehicles passing the **Brandon Inn**. Of these, 10.4% were medium or heavy trucks. **OMYA's** trucks accounted for 24% of the truck trips in downtown **Brandon**. The addition of 170 trucks per day will substantially increase the percentage of **OMYA** trucks that drive through **Brandon** every day. Using **AOT's** figures, if **OMYA** were permitted its requested 340 one-way truck trips per day, then its trucks would represent 40% of the total trucks traveling through **Brandon**.
 67. Noise levels tested from inside the **Brandon Inn** were 56.5 **dba** with the windows closed and 71 **dba** with the windows open before the road was repaved. After it was repaved, the noise levels were 33-35 **dba** with the windows shut. Opening the windows would result in a **dba** of approximately 45. The EPA has identified a night-time average of 35 **dba** as necessary to protect against sleep interference. Sleep interference would be **very** common at 45 **dba** or above.
 68. The noise from **OMYA's** trucks has many unpleasant and harmful effects on the community of **Brandon**. It destroys the character of an historic Vermont village, it discourages tourism, and it degrades the quality of life. Truck **traffic** in general currently operating through **Brandon** makes it difficult to hold conversations and conduct other outdoor activities.
 69. The conclusion contained in the Cavanaugh-Tocci Report filed by **OMYA** that **OMYA** trucks would not significantly increase the noise levels in **Brandon Village** is based on average noise levels and not the instantaneous noise. When evaluating the real effect on people from the noise of passing trucks, it is more appropriate to consider the instantaneous noise **from** the trucks as they pass because that is what people experience.
 70. While the average noise levels may not increase significantly with **OMYA's** proposed additional truck traffic, each additional instance of a truck passing results in an additional instantaneous loud noise, or an additional annoyance that interferes with sleep and conversations. Each additional truck increases the number of times that the loud, instantaneous noise level is experienced. Each truck is experienced as a loud noise for the several minutes it takes to drive through **Brandon Village**.
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71. Instantaneous sound level readings were taken in **front** of the **Brandon** Inn and Rosebelle's Victorian Inn by OMYA's sound expert. The levels ranged **from** 76 **dBA** to 84 **dBA** at the **Brandon IM and** from 77 **dBA** to 82 **dBA** at Rosebelle's Victorian **Inn**, at 25 feet away. **These are** accurate numbers because the inns are located with **20-40** feet from Route 7, and **Mr. Tocci** testified that 10 feet would not change the readings in any significant way. He also testified that the instantaneous noise levels **from** the **trucks** could actually be higher at **times**.
 72. The level 55 **dBA** is an average **24-hour day/night** level identified by EPA to protect public health and welfare with a margin of safety with respect to the outdoor activity, interference, and annoyance factors. This level applies to residential areas such as where Rosebelle's Victorian Inn is located and mixed use areas such as **Brandon** Village.
 73. The instantaneous noise level that a person experiences when a truck **passes is considerably** higher than the 24-hour or hourly average.
 74. The existing background levels that Mr. Tocci measured were 62.4 **dBA** at the **Brandon Inn** and 61 **dBA** at Rosebelle's Victorian Inn. Although Mr. **Tocci** testified that the trucks do not **significantly** increase the **Leq** over background noises, the instantaneous noise **levels** that the **trucks** create are significantly higher than the background noises.
 75. The Federal Highway Administration limit of 83 **dBA** for a pass-by truck driving at 30 **mph is** not relevant to any consideration of annoyance factors or to the issues in this proceeding. Mr. **Tocci's prefiled** testimony was that there are no government standards that apply to this situation. The **Brandon** Noise Ordinance, the Federal Highway Administration, and the **State** of Vermont do not have any standards that apply to this situation.
 76. **Additional OMYA trucks will** result in additional sleep disruptions, more interference with activities, and increased annoyance. As they pass the **Brandon** Inn and other homes and businesses, outdoor noise levels and the interruptions that ensue make the space unattractive for conversation and other activities. As a result, porches become unusable, tourists do not linger as they walk downtown, and there is a decline in the quality of life for residents along the truck route.
 77. Thomas Keefe is an architect who specializes in historic **preservation**. He served on the Vermont Advisory Council for Historic Preservation for six years, including two and a half years as Chair, and one year as Vice-Chair. He was co-
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founder and chair for three years of the Bennington Region Preservation Trust and a charter member of the Historic Preservation Commission for Bennington's certified local government. Mr. Keefe has been involved in historic preservation efforts in **Brandon**.

78. The Vermont Advisory Council reviews all nominations to the National Register of Historic Places, provides testimony on the eligibility of historic resources for the National Register, places resources on the State Register, reviews all state agency undertakings that affect historic resources (public and private), advises the State Historic Preservation Officer on matters of Historic Preservation, and awards state-funded grants for eligible historic properties. In this capacity, the Council helps to shape and interpret Vermont's long-standing commitment to the preservation and protection of its historic resources, in coordination with goals involving economic development and heritage tourism.
 79. The National Register is the official federal listing of historic, architectural, and archaeological resources worthy of preservation. The National Park Service, Department of the Interior, provided matching funds to each state to conduct a comprehensive survey of its cultural resources and nominate significant buildings, structures, sites, and districts to the National Register, which is administered in Vermont by the Division for Historic Preservation. Inclusion in the National Register, in addition to honorific recognition, provides a degree of protection from federally-assisted, licensed, and permitted undertakings which might adversely affect a listed property or jeopardize the property's environment.
 80. The **Brandon** Village Historic District encompasses buildings on both sides of Route 7 in the downtown area, and is a National Register Historic District on the federal register. It includes 245 buildings as contributing structures. The district stretches from Marble St. on the south to a quarter mile north of the Champlain St./Route 73 intersection. Many of the historic buildings are also listed on the State Register of Historic Places.
 81. **Brandon's** many historic buildings and the design of the town are unique in Vermont. **Brandon** Village's visually cohesive streetscape with two greens around which are located the district's religious and public architecture, with the commercial and former industrial sections along streets connecting the two, is a unique example of early town planning.
 82. Among the many historic town centers and villages in the state, **Brandon** Village stands out for its exceptional concentration of significant 19th century
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architecture, resulting **from** almost a century of industrial and commercial success and the early establishment of the unusually picturesque pair of town greens. What could have been merely a cross-roads became an organization of homes and businesses and civic structures, all related to the Congregationalist and **Baptist** churches which each laid out a "common" at a bend in the road to Lake **Champlain**. Pearl and Park streets were laid out as broad militia training grounds, resulting in the deep lawns and tree-shaded streets that are seen today. **The** interplay between all these elements has created a richly-shaped, pleasing village that makes Vermont, and particularly **Brandon** Village, recognizably different from other places.

83. **Along the** streets are examples of Federal Greek Revival, Gothic Revival, **Italianate**, French Second Empire, Queen Ann and Georgian Revival styles in domestic, religious, public and commercial architecture. Several are noted in the National Register nominations as among the finest examples of their respective architectural styles in Vermont.
84. The **Village's** Greek temple-front **Town Hall was** among the most elaborate , **municipal structures** in the State at the time **of** its construction in 1861.
85. The Village is equally significant as a **19th** century industrial center, and several buildings **from** this period and use **ah remain**. The **prosperity** of local commerce in the **19th** century made possible many of the landmark historic residences lining the main road, displaying their outstanding architectural detailing, and signifying the economic success of their owners. Elaborate dwellings are interspersed with more modest, vernacular dwellings once occupied by workers, and still forming a direct link to the industrial heritage of the 19th century village, where living and working were interconnected in ways that enhanced both.
86. **The** almost uninterrupted villagescape of **19th** century structures survives today as a unique concentration of architectural styles, a visual documentation of the village's growth and success in the 19th century, and its preservation in the **20th** century.
87. **Brandon** has an intact historic settlement pattern that intentionally sited the **majority of its** historic buildings along the main north-south route at a time when the road was not a threat to their survival. The very proximity that characterizes its historic authenticity is what makes the Village vulnerable to the present-day problem of excessive heavy traffic.

88. The substantial volume of traffic and size of vehicles has negatively affected the pedestrian experience in **Brandon**. The noise, exhaust fumes, speed, and continual presence of traffic affect the ability of the public to appreciate the architectural and cultural resources of the downtown area.
89. **The** quiet charm of opposing street walls composed of authentic period architectural examples becomes an echo-chamber for large diesel trucks shifting gears as they navigate the hilly, narrow highway in the middle of **Brandon**. The stream of truck traffic overwhelms normal conversation.
90. If people do not feel comfortable working, shopping, living, or visiting in the historic buildings along Route 7, then the support for maintaining and using this resource will be eroded, and an important group of assets will be devalued to the detriment of the **Brandon** Village Historic District.
91. The Vermont Rooms and Meals Tax has increased from 6% in 1994 to 9% in 1997. The tax information submitted by the Agency of Commerce and Community Development does not reflect an increase in the actual amount of business experienced by businesses in **Brandon**, but only the increased tax receipts, resulting in part from a 30% increase in tax rate.
92. The Town of **Brandon** has received grants for historic preservation projects. Vermont and the federal government have invested almost three million dollars to preserve and restore eligible historic buildings in downtown **Brandon** and to support economic development and housing in the town.
93. The integrity of the historic district in **Brandon**, and the public's ability to enjoy and appreciate the historic resources, are being eroded by the truck traffic, including **OMYA's** permitted truck traffic. The public's ability to enjoy and appreciate the historic resources will be further damaged if **OMYA** were permitted to operate an additional 170 truck trips per day.
94. The existing conditions in **Brandon**, prior to any increase in truck traffic, are already bad. It is very hard to relax, to focus on the scenic beauty of the village, or to enjoy shopping with the current level of truck traffic.
95. Conditions in **Brandon** will deteriorate significantly if the traffic increases by 170 large truck trips per day through the town center. An additional truck every 90 seconds in addition to the existing traffic volume will make it much less tolerable to be there. and will drive people away from the downtown. leaving it to become

more and more a truck thoroughfare and less and less the scenic, peaceful, pleasant town center it once was.

96. **The** increased truck traffic proposed by OMYA will have other effects on **the** historic structures, landscape, or setting which are incongruous or incompatible with the buildings' historic qualities, such as new visual, audible or atmospheric elements.
97. As described, the increased truck **traffic** will cause cosmetic degradation such as dirty windows, facades, entrances, merchandise, and personal property; and significant diminishing of the historic character of the neighborhood.
98. The intrusion of an additional 170 truck **trips** per day in this already congested winding, hilly passage through the **downtown** will add significantly to the noise pollution of the area, further disrupting the quiet tranquility of the picturesque village, making commerce, tourism, shopping, walking, **conversation**, eating in restaurants, or sleeping in the Inns yet more difficult and less attractive. It will **make** pedestrians feel less safe; it will make **parking** more **difficult**.
99. **The** adverse effect of **the** additional **truck traffic** proposed by OMYA will interfere with the ability of the public to interpret and appreciate the historic qualities of the site. As noted by a **number** of sources, the **Brandon** Village Historic District is extraordinary and **unique**; it is recognized as one of the very best examples in Vermont of an intact historic town center, and virtually all **the** buildings along Route 7 in the downtown area are **listed** as contributing structures. **The** public can best experience this historic resource by walking through the district, experiencing the changing townscape views, the unfolding perspective, and the historic context that make the **Brandon** National Register District noteworthy. Many visitors to **Brandon**, and **particularly** those who stay in **Inns** in **the historic** district, walk through the downtown to admire the historic architecture and to **shop** and dine in local establishments. The public can also experience the District, to a lesser degree, by driving through it.
100. Much of the appreciation of the district comes from viewing expanses of townscape by looking across the street. Architectural details above street level **can** best be seen from 40 to 100 feet away, where the building as a whole, or in relation to its **neighbors**, becomes apparent. **The** ability to do this greatly impeded by the presence of 10-1/3' high, 48' long **trucks** in the foreground, the noise of **empty trailers** on uneven roads, the blast of air-brakes, the sound of truck engines, and the abundance of dust and diesel exhaust. The appreciation of **architectural**

details, which is one of the principal reasons Vermont is a tourist destination, is a contemplative experience. It is a chance to think about history, heritage, and aesthetics.

101. The proposed increase in truck traffic will have cumulative effects on the historic resources which, when taken together, are significant.
 102. In the past year, Thomas Keefe walked on the sidewalks and in the street on Route 7 in the center of town on approximately six occasions at various times of day. He spent between 5 and 10 hours outdoors examining historic buildings in the downtown district on Route 7. He experienced what the current **traffic** is like. On numerous occasions, normal conversation was forced to halt while loud trucks were driven 50-100' away. He felt vibrations in the ground, and experienced dust and exhaust fumes created by the trucks that made it unpleasant to be outdoors.
 103. The **Brandon** Town Plan sets as one of its explicit goals "To identify, protect, and preserve important natural and historic features of the Vermont landscape, including: ... (d) important historic structures, sites, or districts"
 104. From an aesthetic point of view, **Brandon** Village was built and has been maintained to be comfortable and pleasing for pedestrians. It is characterized by its pedestrian scale and nature; its outstanding architecture in terms of massing, proportion, and detail; its mix of uses, including small-scale commercial and residential uses; common open areas, sidewalks, trees and people of all ages on foot or bicycle strolling, shopping, talking, and relaxing. The building fronts are of a pedestrian scale, inviting people in to shop or onto their porches to sit and relax or socialize. The scale of Route 7, defined by the building edges, is comfortable and inviting to the pedestrian. Originally designed to carry vehicles whose size and speed were compatible with the pedestrian, the street section (from building face to building face) is pedestrian in scale and nature. In addition, the size and density of the buildings in the village create a sense of place particularly suited to the pedestrian.
 105. The addition of 170 daily truck trips as proposed by the applicant will not be in harmony with the character of **Brandon**. There already is a substantial volume of truck traffic driving through **Brandon**. The **traffic** is not yet the distinguishing feature of the town. **Brandon** still retains its essential character, even with the existing traffic, although there are signs that certain aspects of its character are already degraded. such as the ability to enjoy lunch on the terrace of the **Brandon**
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Inn. The addition of 170 daily truck **trips** would tip the balance in defining the character of **Brandon** by overwhelming the village with truck traffic,

106. The Town Plan states:

Scenic resources have aesthetic, historical, and economic **value**. They create an attractiveness enjoyed by residents, prospective residents, and visitors. Land values are enriched by a pleasant visual surrounding. Loss of these amenities would diminish the attractiveness and worth of the **community**.

* * *

The Planning Commission should encourage development which complements or enhances the scenic quality of the **Brandon** landscape. In conformance with 10 V.S.A., Chapter 15 1, Section 6086(8), development which threatens to adversely affect the visual amenities of the Town should not be permitted.

107. There does not exist a clear written community standard in **Brandon** regarding the use, volume, or appearance of **traffic** on US Route 7.

108. The proposed increase of 170 **18-wheel**, 22 or **24-ton** truck trips per day, six days per week, beginning at 6:00 in the morning, will significantly diminish the scenic qualities of **Brandon** Village. The concept of aesthetics encompasses more than just visual. Aesthetics involves all the senses, **including** sound, smell, and overall perception. Aesthetics involves the sense **of a** place and the quality of life that a place affords. The aesthetics of a Vermont village environment include all of the qualities that make it attractive and desirable to live in and visit.

109. **One** aspect of aesthetics is the degree to which people feel comfortable in a place. Because trucks are so out of scale for the pedestrian, one feels more comfortable being inside a car when next to a truck than being a pedestrian. The size of the trucks alone is frightening to pedestrians. and the noise they make is destructive to the ability of pedestrians. both tourists and locals alike, to enjoy being outside.

110. An increase in trucks of the magnitude proposed will make it increasingly difficult for the Main Street in **Brandon** to continue to function as the civic center of the community. Because of the noise and unpleasantness created by the trucks, people are already abandoning their front yards and porches. The **Brandon Inn**, a

grand structure which was designed and built to encourage and inspire civic interaction and life, no longer serves meals on its terrace because of the unpleasantness of the truck traffic. The loss of civic life and community resulting from truck traffic is difficult to quantify.

111. A Memorandum of Understanding was signed in October, 1998 by OMYA, Conservation Law Foundation, and several state agencies. It calls for all parties to work toward construction of a rail spur in five years.
112. Despite the professed desire of the parties to the MOU, there are a number of issues affecting the achievement of this project. The construction of a rail spur within five years is contingent upon many factors, such as economic feasibility, legislative funding, obtaining environmental permits. The construction of a rail spur would require resolving significant engineering and environmental issues. Not the least of the contingencies is that OMYA must decide that it is economically worth its while to invest money in the rail spur. It has not yet made that commitment.
113. If the rail spur is not constructed, there are no other alternatives proposed to alleviate truck traffic in general that is, in large part, caused by OMYA.
114. The "OMYA Quarry Material Alternative Transport Legislative Study" prepared by R.L. Banks & Associates, dated January 6, 1999 ("Legislative Study"), presents information about potential alternatives to OMYA's use of trucks to transport its ore from the Middlebury Quarry to the Florence processing plant. The study was conducted in response to complaints from many Vermont residents about the negative impacts of OMYA's trucking operation along the route traveled. The Legislative Study identifies a rail spur (Alternative 1) as the best alternative.
115. The Legislative Study contains the following statements concerning the existing problems with OMYA's truck traffic on Route 7:

U.S. Route 7 carries significant volumes of heavy-truck traffic frequently passing through centers and towns, and has raised concern from some corridor residents. Truck movements associated with OMYA quarry operations are a significant portion of total truck traffic: representing between one-fourth and one-half of truck traffic at various points along the route. Furthermore, total

traffic demand between Middlebury and Florence has been projected to rise 15 to 20 percent per decade.

Congestion is costly to the economy in terms of lost time, increased fuel consumption and number of accidents. The greater use of heavy-trucks and the increase in heavy-truck accidents often are cited as factors contributing to **traffic** delays and congestion cost. [Citation omitted] ...

It is not possible to quantify the impact of this operation upon congestion or identify the point beyond which **traffic** delays are or would become onerous. It is however believed that this segment of U.S. Route 7 is coming close to its estimated capacity especially at rush hours in certain locations. Thus the relatively larger amounts of OMYA **traffic**, if it could be effectively diverted or **eliminated**, would yield substantial **benefits** to the corridor.

116. The report concludes that a 3.2 mile **long rail spur from** the Middlebury quarry to an existing rail line would be the least expensive alternative, and that it would be more cost effective for OMYA than its **current** use of trucks.
117. According to the Legislative Study at **Volume I**, page VII-1, it **will** be at least five to eight years before the preferred Rail **Spur** Alternative 1 could be completed:

In general, anticipated permitting, financing, right-of-way acquisition and construction would require five to eight years; however, unusual issues in permitting and right of way acquisition could easily extend that estimate. ... If state or other government funds were to be applied to rail **spur** or conveyor construction, additional consideration must be provided to existing property owners, and impacts carefully reviewed. ... In addition, the **process** to seek funding could easily add years to the process.

IV. CONCLUSIONS OF LAW: PRELIMINARY LEGAL ISSUES

A. The Commerce Clause, Equal Protection Clause, and Supremacy Clause of the U.S. Constitution and Vermont Constitution

1. The Commerce Clause

The United States Constitution provides that Congress “shall have the power to .. , regulate commerce with foreign nations, and among the several States.” Art. I, sec. 8, cl. 3 (the “Commerce Clause”). There are **two** standards of review which may be applied to state regulations in commerce issues: the strict scrutiny test and the deferential balancing test. The deferential test applies to the present case.

The strict scrutiny test applies when a state law is shown to discriminate against interstate commerce “either on its face or in practical effect.” Hughes v. Oklahoma, 441 U.S. 322,336 (1979) as cited in Maine v. Taylor, 477 U.S. 131,138 (1986). If such blatant discrimination is shown, the state has the burden to demonstrate both that the statute “serves a legitimate local purpose,” and that this purpose could not be served as well by available nondiscriminatory means. Id

In the present case, the state regulation of OMYA’s use of Route 7 does not rise to the level of discriminating either facially or in practical effect. Several historical cases, involving unconstitutional denial of permits to operate motor vehicles in interstate commerce, are distinguishable from the present case. In Buck v. Kuykendall, 267 U.S. 307 (1925), the U.S. Supreme Court found that a state’s denial of a permit to operate a bus line violated the Commerce Clause. The Court reasoned that such a complete prohibition designed to prevent competition would obstruct interstate commerce. Id. at 3 16. In the present case, however, the state is not denying OMYA access to Route 7. The regulation is merely a limit upon an existing right of access and does not constitute an obstruction of interstate commerce.

In Magnuson v. Commissioner of Transportation, 35 F.2d 867 (E.D. Ky. 1927), the issue **involved the** extent to which an interstate common carrier had the right to use the public highways of the state. A bus line applied for a permit to operate a passenger line, but was granted a permit for only half the round trips sought. Again, as in Buck but unlike the present case, there was no pre-existing permit. This is critical in assessing which standard of review applies. It is likely that a regulation consisting of an outright ban (Buck) or based on a hypothetical condition (Magnuson) will be subject to strict scrutiny because such regulations are discriminatory either facially or in practical effect.

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

Page 26

A more deferential balancing standard applies to state regulations which do not **directly** restrict interstate commerce. The standard is:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, . . . it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will **of course** depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137,142 (1970).

A slight twist is added to this balancing approach in cases where state highway regulations are challenged under the Commerce Clause. Raymond Motor Transp. Inc. v. Rice, 434 U.S. 429,443 (1978).¹ The Supreme Court has often stated that it is **reluctant** to use the Commerce Clause to invalidate state regulations in the field of safety. Id. More specifically, much greater deference is granted to state regulations in the field of highway safety. Challenges to such regulations must overcome a "strong presumption of validity." Bibb v. Navaio Freight Lines, Inc. 359 U.S. 520,524 (1959).

A necessary distinction that must be addressed in applying the balancing standard is whether the state regulation is local or national in nature. Cooley v. Board of Wardens, 53 U.S. 299, 318 (1851).² In Cooley, the Court found that local statutes regulating subjects peculiar to local interests are **valid**, while those regulating national subjects are invalid. Id. While such a rigid conclusion is no longer strictly followed, the distinction is useful. A more modern approach to this distinction dictates that matters which demand local knowledge and different systems of regulation, often matters in areas of safety and public health, are deemed local in nature. If the issue demands a single, uniform system or plan under national standards, however, it should be considered national.

The present case deals with a local subject **and**, therefore, is given less scrutiny because of its lesser impact on the nation. Consolidated Freightways Corp. v. Kassel,

1. See also Lisa J. Petricone. *The Dormant Commerce Clause: A Sensible Standard of Review*, 27 Santa Clara L. Rev. 443, 448(1987)

2. See also Id.

450 U.S. 662, 670 (1981) (Iowa limit on truck length was found unconstitutional because it was not a valid safety **measure**).³ The state regulation of OMYA's use of Route 7 does not impact the nation nor does it require a uniform plan under national standards. It merely involves the regulation of truck traffic on a particular stretch of Route 7 within Vermont in an effort to avoid undue congestion and unsafe conditions under Criterion 5, and an undue adverse effect on aesthetics and historic sites under Criterion 8. In short, the state's action in the present case is rationally related to its desired end and, therefore, is valid under this lesser scrutiny.

Another consideration is the fact that modern interstate highways are vastly different from two-lane roads, such as those involved in the present case. See, e.g., South Carolina State Highway Dep't v. Bamwell Bros., Inc., 303 U.S. 177 (1938) (South Carolina limit on truck weight and length found constitutional); Sproles v. Binford, 286 U.S. 374 (1932) (Texas limit on truck gross weight and length found constitutional).⁴ In both Bamwell and Sproles, the Court reasoned that safety purposes existed for the proposed regulations primarily because of the less rigorous construction standards of the local roads involved. Bamwell, 303 U.S. at 180; Sproles, 286 U.S. at 389. Both of these cases involved roads which were smaller and more local in nature than typical federal, four-lane highways. Route 7 is an example of such a road. Despite being **federally-funded**, it has fewer lanes than an interstate highway. As a local roadway, Route 7 may be regulated by the state because it is a state's right to promote safety interests. Bamwell, 303 U.S. at 185. Likewise, Vermont has the right to protect the state's interest in aesthetics and historic sites.

A final consideration which must be addressed in applying the deferential standard to a state regulation involves a balancing between the purpose of the regulation and its effect on commerce. In other words, if a law's benefits are slight and illusory while its burden on interstate commerce is substantial, then the law will be found invalid under the Commerce Clause. Kassel, 450 U.S. at 670. In Kassel held that Iowa's law imposed a disproportionate burden on out-of-state interests while according special exceptions to Iowa concerns. Therefore, the issue was not given the special deference normally given to safety regulations. Id. at 678.

3. See also Id. at 458.

4. See also Steven C. Kohl, *Constitutional Law -- Kassel v. Consolidated Freightways Corp.: 'Goodbuddy' Raymond Revisited in Name Only*, 8 J. Corp. L. 543, 560 (1983).

In addition to the factual distinctions between Kassel and the present case, Kassel is distinguishable in that it did not involve a valid **safety** concern. Conversely, the present case involves several. The state's safety concerns in the present case include increased congestion and the inability of Route 7 to accommodate more **traffic**.

Accordingly, state regulation of OMYA's use of Route 7 is subject to the deferential balancing standard of the Commerce Clause because the regulation is a valid **safety** concern which is particularly local in nature. **The** state's interests are substantial **enough** to warrant validity under the deferential standard of the Commerce Clause.

2. The Equal Protection Clause

The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall ... deny to any person within its **jurisdiction** the equal protection of the laws." U.S. Const. amend XIV, §1. There are two standards of review which may be applied to equal protection issues: the strict scrutiny test and the rational basis test. The rational basis test applies to the present case.

The strict scrutiny test only applies **when** a state action impinges upon a **fundamental** right. Dunn v. Blumstein, 405 U.S. 330, 336 (1972). In such instances, the state's action must be taken in the least restrictive means possible to accomplish the state's objective. Id. Heightened scrutiny does not apply to the present case because there is no impingement on a fundamental **right**.

The freedom of interstate migration, or **right** to travel, is treated as a fundamental right even though it is not expressly guaranteed by the Equal Protection Clause. Although the present case involves a regulation on truck travel, it does not fall within the realm of traditional fundamental right to travel **cases**. Typically, the right to travel applies when a state treats newly-arrived residents significantly less favorably than **long-term** residents. **The** majority of cases **involving** the **right to** travel restrict migration rights of **some** but not all citizens. See, e.g., Shapiro v. Thompson, 394 U.S. 615 (1969) (Court invalidated denial of welfare benefits to **newly-arrived** residents); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (Court **struck down** residency requirement as a condition for indigent receiving medical **care**); Sosna v. Iowa, 419 U.S. 393 (1975) (Court **upheld** residency requirement for divorce in the interest of not becoming a "divorce mill").

It is clear that **the present case** does not raise issues of residency. Nor does it concern interstate migration. **The state** regulation of OMYA's use of Route 7 simply involves truck traffic **between** two Vermont venues: the Middlebury quarry and the

Florence Verpol processing plant. The state is merely concerned with the resulting congestion and unsafe highway conditions and the effect on the aesthetics and historic sites within **Brandon** Village along Route 7. Accordingly, it would be improper to invoke the strict scrutiny standard where no fundamental right is invaded or even at issue.

Because strict scrutiny is not warranted, the Board looks to the “rational basis test” which provides that a state’s action will survive an equal protection challenge if it is rationally related to a legitimate state purpose, assuming that no fundamental right is involved. Nordlinger v. Hahn, 505 U.S. 1 (1992). The legitimate state purposes in the present case include minimizing congestion and maintaining safety, preventing an undue adverse impact on historic sites and aesthetics, and ensuring that associated sections of Route 7 can withstand the proposed traffic. The state’s regulation of **OMYA’s** truck traffic need only be rationally related to these interests in order for the action to survive an equal protection challenge.

The regulation over an increased number of trucks traveling on Route 7 is rationally related to each of the aforementioned state interests. **Accordingly**, the state regulation of **OMYA’s** use of Route 7 is subject to the rational basis standard of the Equal Protection Clause because no fundamental right is involved and because the regulation is rationally related to each of the state’s interests.

3. The Supremacy Clause

A state law or action is preempted by federal law if(i) the federal statute expressly preempts state action, (ii) the state law is in direct conflict with a federal law, or (iii) federal regulation is pervasive in the field. In the present case, the state regulation of **OMYA’s** use of Route 7 would not be preempted by the Supremacy Clause under any of these three criteria.

First, there is no federal statute which expressly addresses permissible limits on numbers of vehicles traveling on state highways. There are, however, statutes with implied preemption provisions. For example, the Federal Aviation Administration Authorization Act of 1994 suggests preemption in the following provision:

§ 14501. Federal authority over intrastate transportation.

(c) Motor carriers of property.

(1) General rule. Except as provided in paragraphs (2) and (3), a state [or] political subdivision of a state, ... may not enact or enforce a

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

Page 30

law, regulation, or other provision having the force and effect of law
~~any other~~ to a price, route, or services of with respect to
the transportation of property.

49 U.S.C. § 14501.

It is critical to focus on subparagraphs (2) and (3), since these give a state the right to regulate safety and other matters not otherwise preempted by federal law. Id.: see Legislative History, P.L. 103-305 at 1756. Accordingly, a state cannot regulate rates, routes, or services under the “guise” of safety without evidence that its restrictions are based upon valid safety problems. Id. The Board can discern no reason why concerns related to aesthetics and historic sites should be analyzed any differently than **safety** issues.

A second criterion of the Supremacy Clause is whether the state law is in direct **conflict with** a federal law. In the present case, there is no applicable federal law **which** directly **conflicts** with the proposed permit amendment because of the state’s right to regulate rates, routes, or services due to **safety** concerns.

The third criterion of the Supremacy Clause is **also** inapplicable to the present case because there is no applicable federal law specifically addressing limits on numbers of vehicle trips **on state** highways. Consequently, federal regulation is not pervasive **in** the field.

Accordingly, the state regulation of **OMYA’s** use of Route 7 does not invoke the Supremacy Clause because, as a safety issue, it cannot be preempted by federal law, and aesthetic and historic site issues should be treated similarly to safety issues.

B. Board Jurisdiction Over Traffic

An Act 250 permit authorizes a project’s construction and operation. See Re: Interstate Uniform Services, Inc., Declaratory Ruling #147 at 7 (Sept. 26, 1984). In fact, many criteria would be meaningless if Act 250’s regulatory authority was limited to just the effects caused by a project’s creation. For example, a solid waste facility may result in little water pollution under Criterion 1 **during** its construction, but could result in substantial water pollution as a result of its operation.

In this case, the construction at the Middlebury quarry is useful to OMYA **only** if OMYA can transport the quarried material by truck from Middlebury to its Verpol plant in Florence. The truck traffic through Brandon is a direct result of the construction and

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

Page 3 1

ongoing operation of the Middlebury quarry. In fact, the key component of the Middlebury quarry's ongoing operation is the use of trucks to transport material to Verpol. It would defeat the purpose of Act 250 to conclude that there is no jurisdiction over OMYA's truck traffic.

Accordingly, the Board has jurisdiction over OMYA's truck traffic within the **Brandon** urban compact. Because the construction activity in Middlebury was within the territorial boundaries of the District Commission, the Board concludes that the issue of OMYA's truck traffic through **Brandon** as a direct result of that construction was properly considered by the Commission.

C. Collateral Estoppel due to Land Use Permit #1R0271 series

Collateral estoppel is a doctrine which is intended to eliminate repetitive litigation and give repose to litigants. Applying collateral estoppel prevents a party from

Hardy, 144 Vt. 136,138 (1984). Although collateral estoppel does not apply to

250ppel generally apply in See I n Application

Pollander op. at 3 (Dec. 5, 1997). The

This Court looks to the five elements set forth in Trepanier v. Getting Organized, Inc., 155 Vt. 259,265; 583 A.2d 583,587 (1990), and finds preclusion when: (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Id.

To decide whether the Board is collaterally estopped by the Land Use Permit #1R0271 series such that conditions 11, 12, and 13 of the Permit should be voided, the Board first needs to examine *the #1R0271 Land Use Permits*. These permits are not before the Board. In this respect, Pittsford and OMYA have failed to meet their burden of proof to establish that the Board is collaterally estopped.

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

Page 32

The evidence before the Board as it pertains to the Land Use Permit #1R0271 series is that these permits authorize the construction and operation of OMYA's Verpol processing plant. Thus, even if the Board had these permits, since they authorize the Verpol processing plant and not the truck traffic originating from the Middlebury quarry, the issues in this appeal are not the same as those that were decided by the issuance of the #1R0271 Land Use Permits. The Trepanier factors are not, and cannot, be satisfied. Accordingly, the Board is not collaterally estopped by the issuance of the Land Use Permit #1 R0271 series.

D. Legislative Study

At the January 13, 1999 hearing, the Board directed ACCD to file with the Board the study required by section 10 (d) of Public Act 144 from the 1997 Adjourned Legislative Session, An Act Relating to the State's Transportation Capital Program and Project Development Plan ("Legislative Study").

The parties have stipulated to the authenticity of the Legislative Study with the only objection to its admission into the record being one of relevancy. The Legislative Study presents information about potential alternatives to OMYA's use of trucks to transport its ore from the Middlebury Quarry to the Florence processing plant. The Board concludes that the Legislative Study is relevant to the criteria that are on appeal and, therefore, the Legislative Study is admitted into the evidentiary record.

E. Innkeepers Motion to Alter Exclusion of Glitman Letter

At the Hearing, the Board excluded Exhibit I-26. The Innkeepers have filed a motion to alter with respect to this ruling. The Board concludes that the ruling made at the Hearing is correct for the reasons stated at that time and, therefore, it denies the motion to alter.

V. CONCLUSIONS OF LAW: CRITERIA ON APPEAL

A. Burden of Proof

With respect to Criteria 5.7. and 8, under 10 V.S.A. § 6085, the burden of proof is on the opponents to an application, but OMYA must provide sufficient information for the Board to make affirmative findings. 10 V.S.A. § 6088(b); Re: St. Albans Group and Wal-Mart Stores, Inc., #6F0471-EB. Findings of Fact, Conclusions of Law, and Order (Altered) at 50 (June 37, 1995). With respect to Criterion 9(K), the burden of proof is solely on OMYA. The Innkeepers have party status only under Criteria 3. S. and 9(K).

B. Issue 4 - Criterion 5 (traffic)

Criterion 5 requires the Board to find that the OMYA truck traffic through **Brandon** Village will not cause unreasonable congestion or unsafe conditions with respect to the use of Route 7. The Board may not deny a permit pursuant to Criterion 5, but may impose permit conditions to alleviate impacts created by a proposed project. 10 V.S.A. § 6087(b).

Based on the findings of fact, the Innkeepers have failed to persuade the Board that any level of increased truck **traffic through Brandon** will result in unsafe conditions. OMYA's trucks drive at or below the speed limit, stop for pedestrians in cross walks, and have an outstanding safety record. There are appropriate management policies in place so that the drivers of OMYA's trucks can be reprimanded or terminated if their driving results in unsafe condition. The Board is persuaded that OMYA will ensure that these policies are adhered to and enforced for the safety of all persons.

With regard to the issue of congestion, however, the Board is persuaded by the Innkeepers that there will be unreasonable congestion caused at certain side streets within the **Brandon** Village if OMYA is permitted to increase its number of truck trips by the requested 170 trips. In particular, the Board is concerned about LOS for certain turning movements at the Carver Street/Route 7 intersection and the Union Street/Route **73/** Route 7 intersection.

The Board's authority under Criterion 5 is limited to the imposition of permit conditions to alleviate impacts created by a proposed project. The Board concludes that the condition required under Criterion 8, infra, will partially mitigate the unreasonable congestion **that** would have resulted if OMYA were allowed the full 170 truck trips. In addition, the limitation on the number of truck **trips** between 3:30 p.m. and 5:00 p.m. will also partially mitigate the existing LOS deficiencies at the identified intersections. Finally, the Board will require by permit condition that any application by OMYA to increase the level of truck traffic over that which is authorized herein include a traffic study of the identified intersections. Based on these conditions, the Board concludes that the increase of OMYA truck traffic as authorized under Criterion 8, infra, complies with Criterion 5.

C. Issue 5 - Criterion 7 (governmental services)

Under Criterion 7, the issue before the Board is whether an increase in OMYA's truck traffic will place an unreasonable burden on the ability of Pittsford to provide municipal or governmental services. Based on the findings of fact, it is clear that no such

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

Page 34

unreasonable burden will result, regardless of whether OMYA operates the requested 170 additional trips or the lesser amount authorized by the Board under the other appealed criteria.

D. Issue 6 - Criterion 8 (aesthetics)

Under Criterion 8, the Board must determine whether the Project will have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. The controversy in this case centers on aesthetics and historic sites. The Board's aesthetics and historic sites analysis, while similar, are not the same. This sub-section D addresses aesthetics. Sub-section E addresses historic sites. Sub-section F addresses conditions that will be imposed in connection with Criterion 8.

Under Criterion 8, the Board first determines whether a project will have an adverse effect on aesthetics. If such is the case, then the Board must determine whether the adverse effect on aesthetics is undue. Re: Quechee Lakes Corp., #3W0411-EB and #3 W0439-EB, Findings of Fact, Conclusions of Law, and Order at 17-20 (Nov. 4, 1985)[EB #241].

1. Adverse Effect

In determining whether a project will have an adverse effect, the Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. Re: James E. Hand and John R. Hand d/b/a/ Hand Motors and East Dorset Partnership, #8B0444-6-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 25 (Aug. 19, 1996)[EB #629R]. In making this evaluation, the Board examines a number of specific factors including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space. Id.

Brandon Village is an historic district that brings together a combination of private, civic, and religious buildings to form a traditional Vermont village. Within this setting, there is a level of truck traffic that is compatible with Brandon Village as a traditional Vermont village. Because trucks generate high levels of instantaneous noise and emit fumes, it is clear that OMYA's trucks will have an adverse effect on the aesthetics of Brandon Village. Based on the findings of fact, the Board concludes that the addition of 170 truck trips by OMYA through Brandon Village will have an adverse effect on aesthetics.

2. Undue

Having concluded that there will be an adverse effect on aesthetics, the Board must now decide whether such adverse effect is undue. In making this determination, the Board considers three factors. Quechee Lakes, supra at 19-20.

a. community standard

Under this first factor, the Board must determine whether the addition of 170 OMYA truck trips violates a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area.

The Board explained the intent of the clear, written community standard in the Re: Town of Barre, #5W1167-EB, Findings of Fact, Conclusions of Law, and Order (June 2, 1994)[EB #589]:

In adopting the first standard in the Quechee analysis, the Board intended to encourage towns to identify scenic resources that the community considered to be of special importance: a wooded shoreline, a high ridge, or a scenic back road, for example. These designations would assist the district commissions and the board in determining the scenic value of specific resources to a town, and would guide applicants as they design their projects.

Id. at 21.

At issue in Barre was the following portion of a town plan discussing scenic resources:

In the 1989 planning survey dealing with future growth, preservation of visual beauty was the highest priority of the residents polled. Eighty-nine percent of those responding said that planning to retain visual beauty was necessary. . . . Barre Town's visual beauty is an asset which the Town has to offer to any prospective resident or employer who is considering relocating to the community. ...[T]he Town of Barre's policy regarding aesthetics is one of encouraging

enhancement and preservation of natural areas, views, and vistas.

Id. at 13-14.

In Barre, the Board ruled that the above quoted language did not **rise** to the level of a clear, written community standard because it applied generally to the **community** at large rather than to specific scenic resources in the project area.

In contrast to Barre was the town plan provision at issue in Re: Taft Corners Associates, #4C0696-11-EB(Remand), Findings of Fact, Conclusions of Law, and Order (Revised) (May 5, 1995)[EB #532R2]. The Board **found** that the town plan identified as “significant” the views of the mountains to the east and west and foreground views **from** I-89 of “the high ground at the water tower and other open spaces ...” Id. at 19. The Board quoted the town plan:

Taft Corners should feature quality design, compatible with its setting. Buildings should be **architecturally** compatible and should be enduring, not transient. Their siting should enhance the setting, and particularly the east-west views. The placement of buildings should define public spaces, such as the streets, **courtyards** and greens. The area should be well landscaped, and feature **green** spaces, open spaces, trails and other opportunities for human interaction.

Id. at 18-19. Based on the above language, the Board found a clear, written community standard “which contains provisions regarding aesthetics” that applied to the project. Id. at 42.

The **Brandon Town** Plan does not contain a clear written **community** standard regarding the use, volume or appearance of **traffic** on Route 7. While it is true that the plan does set an aesthetic standard for other areas and uses, there is no language in the plan which specifically **addresses** truck traffic through **Brandon Village**.

This case is distinguishable from that which **was** before the Board in Re: Herbert and Patricia Clark, #1R0785-EB. Findings of **Fact**, Conclusions of Law, and Order (Apr. 3, 1997)[EB #652], in which a retail **hardware** store was proposed to be constructed precisely within one of the several scenic areas specifically designated for protection under the **Brandon Town Plan**. In determining **that the** Clark project would violate a clear written community standard as to aesthetics, the Board stated:

As agreed upon by the parties, the Project would be located in Scenic Area 9-- one of the scenic areas expressly listed in Brandon's scenic areas inventory. These areas are rare in **Brandon**. The foregoing provision of the Town Plan is clear vis-a-vis such areas. Through the Town Plan, the citizens of **Brandon** have adopted a "better safe than sorry" approach to their scenic areas. The Town Plan prohibits any development which even threatens to adversely affect them. Such protection, while more expansive than that afforded under Criterion 8, is well within the authority of the Town Plan. It is commended and supported by the Board. This is especially true in this matter because the Project would not "fit" its surroundings and would have an adverse effect on aesthetics and scenic beauty of the area in which it would be located.

Id. at 37.

The town plan provisions at issue in Clark refer to and are designed to protect designated scenic resources, not one of **which** contains the segment of Route 7 here at issue. As such, there is no "clear written **community standard**" that is violated by placing trucks on the public highways, and particularly on Route 7.

b. shocking and **offensive**

Under this second factor, the Board must determine whether the addition of 170 OMYA truck trips offends the sensibilities of the average person. This includes whether the **truck traffic** would be offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area.

Brandon Village is an historic village that also has Route 7 running through its center. **Brandon** Village has a dual nature: it is a quintessential Vermont village and the setting for one of Vermont's major thoroughfares. Therefore, these two components of **Brandon** Village must co-exist without either component taking precedence over the other. This means that a certain level of truck traffic is acceptable, but also that there is a level which is unacceptable.

The addition of 170 OMYA truck trips is unacceptable because it will overwhelm, if not extinguish, those elements of **Brandon** Village which make it a quintessential Vermont village. OMYA's trucks, if running at the additional 170 trips, would impose a shocking and offensive burden on the people who live, work, and visit in **Brandon** Village.

It is unpleasant to be outside during the day when the truck traffic is heavy. An indicator of this is that the Brandon Inn had to stop serving lunch on its terrace because the noise from the trucks is so loud that guests could not carry on a conversation and the dust, dirt, and exhaust fumes were unpleasant. The stone facade and paint of the Brandon Inn must be hosed down every two weeks to remove dust and dirt. Similarly, glass tables outside the Inn must be washed every day because a black residue settles on them.

The intrusion of an additional 170 truck trips per day in Brandon Village will add significantly to the noise of the area, further disrupting the quiet tranquility of the picturesque village, making commerce, tourism, shopping, walking, conversation, eating in restaurants, or sleeping in the inns more difficult and less attractive.

In particular, the instantaneous noise that would result from each of the 170 truck trips through Brandon Village would be out of character with its surroundings and would significantly diminish the scenic qualities of the area. The addition of 170 OMYA truck trips would result in additional sleep disruptions, additional activity interference, and increased annoyance. As the trucks pass through the village, outdoor noise levels and the interruptions that ensue make the space less attractive for conversation and other activities. As a result, porches would become unusable, tourists would not linger as they walk downtown, and there would be a decline in the quality of life for residents along the truck route.

The Board concludes that the addition of 170 truck trips through Brandon Village would be shocking and offensive because it is Out Of character with its surroundings, and would significantly diminish the scenic qualities of the area.

c. mitigation steps

Under this third factor, the Board must determine whether OMYA has failed to take generally available mitigation steps which a reasonable person would take to improve the harmony of the project with its surroundings.

Much of the testimony on this issue has centered on whether, and to what extent, OMYA has considered the use of alternative traffic routes. and alternative modes of transportation.

There are alternate routes which would avoid the use of Route 7 through the Village of Brandon. OMYA has not specifically investigated the various potential alternative routes because Route 7 is the most direct. The Board notes that using alternate

routes for some or all of the additional truck trips would mean driving through communities other than **Brandon**.

With regard to alternate modes of transportation, the Legislative Study identifies a rail spur as an alternative if certain details in the Study can be overcome.

The consideration of alternative routes and modes of transportation is vital given **Brandon Village's** dual role as an historic village and major thoroughfare. Absent such consideration, the Board concludes that OMYA has failed to take generally available mitigation steps which a reasonable person would take to improve the harmony of the project with its surroundings.

E. Issue 6 - Criterion 8 (historic sites)

Under the Criterion 8 historic sites analysis, the Board has conducted a three-step inquiry: (1) whether the proposed project site is historic; (2) whether the proposed project will have an adverse effect on the historic site; and (3) whether the proposed project's adverse effect will be undue.

1. historic site

Under 10 V.S.A. § 6001(9), a site listed on the State Register is an historic site. 10 V.S.A. § 6001(9) provides:

Historic site means any site, structure, district or archeological landmark which has been officially included in the National Register of Historic Places and/or the state register of historic places or which is established by testimony of the Vermont Advisory Council on Historic Preservation as being historically significant.

The statute clearly and conclusively states that a structure which is included on the State Register is an historic site. No discretion is provided to the Board to declare a structure listed on that register not to be historic. See Re: Middlebury College, #9A0177-EB, Findings of Fact, Conclusions of Law and Order at 9 (Jan. 26, 1990)[EB #441] (one of three ways in which a site's historic nature may be established under Act 250 is placement on the National Register of Historic Places).

Based on the findings of fact, the **Brandon Village Historic District** is an historic site for purposes of Criterion 8.

2. adverse effect

The Board stated in Middlebury College the following with respect to whether there is an adverse effect on an historic site:

In evaluating adverse effect on a site, it is central to determine whether a **proposed** project is in harmony or **fits** with the historic context of the site. Important guidelines in evaluating this fit include: (1) whether there will be physical destruction, damage, or alteration of those qualities which make the site historic, such as an existing structure, landscape, or setting; and (2) whether the proposed project will have other effects on the historic structure, landscape, or setting which are incongruous or incompatible with the site's historic qualities, including, but not limited to, such effects as isolation of an historic structure from its historic setting, new property uses, or new visual, audible or atmospheric elements.

Id. at 10.

The Board concludes that there will not be any physical damage to the **Brandon Village Historic District** due to **OMYA's** truck traffic. Nevertheless, based on the findings of fact, the Board concludes that the requested increase of 170 truck trips will have an adverse effect on historic sites within the **Brandon Village Historic District**. The cumulative effect of truck noise, fumes, and presence is incongruous and incompatible with the site's historic qualities.

3. undue

Because the Board has concluded that there will be an adverse effect on historic sites, it must now determine whether such adverse effect is undue.

The Board stated in Middlebury College the following with respect to whether there is an undue adverse effect on an historic Site:

The "undue" quality of an effect on an historic site can be judged in several different ways. A positive conclusion on any one of the following guidelines can lead to a determination that an adverse effect is undue:

- a. The failure of an applicant to take generally available mitigating steps which a reasonable person would take to preserve the character of the historic site.
- b. Interference on the part of the proposed project with the ability of the public to interpret or appreciate the historic qualities of the site.
- c. Cumulative effects on the historic qualities of the site by the various components of a proposed project which, when taken together, are so significant that they create an unacceptable impact.
- d. Violation of a clear, written community standard which is intended to preserve the historic qualities of the site.

Id.

For the same reasons stated with respect to the aesthetics analysis conducted above in sub-section D, the Board concludes that there will be no undue adverse effect under **sub-part** (d) of the historic sites analysis articulated in Middlebury College.

Nevertheless, the Board also concludes that an additional 170 OMYA truck trips will have an adverse effect on historic sites under sub-parts (a), (b) and (c) of the Middlebury College analysis.

With regard to sub-part (a), the Board reaches this conclusion for the same reason discussed under the mitigating steps portion of the Criterion 8 aesthetics analysis above.

With regard to sub-parts (b) and (c), an additional 170 OMYA truck trips will cause an undue adverse effect on historic sites in **Brandon**. The **Brandon** Village Historic District is an intact historic settlement. It is a valuable historic resource which is comprised of private, civic, and public buildings. Fundamental to its appreciation is the experience of walking along the streets, including Route 7. Truck traffic, including but not limited to OMYA truck traffic, has negatively affected the pedestrian experience in **Brandon**. The noise, exhaust fumes, speed, and constant presence of **traffic** are affecting

the ability of the public to stand outside and appreciate the architectural and cultural resources of the downtown area.

The addition of 170 daily truck trips as proposed by OMYA will not be in harmony with the character of Brandon. There already is a substantial volume of truck traffic driving through Brandon. The traffic is not yet the distinguishing feature of the town. Brandon still retains its essential character, even with the existing traffic, although there are signs that certain aspects of its historic character are degraded. The addition of 170 daily truck trips would tip the balance in defining the character of Brandon by overwhelming the village with truck traffic. If this were to happen, then the historic value of the Brandon Village Historic District will be eroded and this historic resource would be devalued to the detriment of the state of Vermont.

F. Criterion 8. Permit Condition

In summary, based on the findings of fact, the Board concludes that the addition of 170 OMYA truck trips through Brandon Village would have an undue adverse effect on aesthetics under Criterion 8. While this additional truck traffic would not violate a clear written community standard, it would offend the sensibilities of the average person. The consideration of alternative routes and modes of transportation is vital given Brandon Village's dual role as an historic village and major thoroughfare and it should be undertaken in collaboration with the Vermont Agency of Transportation. Absent such consideration of alternatives, the Board concludes that OMYA has failed to take generally available mitigation steps which a reasonable person would take to improve the harmony of the project with its surroundings.

Similarly, under the historic sites analysis of Criterion 8, the Board has concluded that the addition of 170 OMYA truck trips through Brandon Village will have an undue adverse effect on historic sites. The Board has reached this conclusion with respect to sub-parts (a), (b), and (c) of the third part of the Middlebury College test.

These conclusions would normally mandate a denial of the application. The Board is persuaded by the evidence, however, that a permit condition can be imposed which authorizes an increase in OMYA's permitted level of truck traffic that complies with both the aesthetics and historic sites portion of Criterion 8.

Under 10 V.S.A. § 6086(c), a permit may contain such requirements and conditions as are allowable within the police power and are appropriate with respect to the Act 250 criteria. A permit condition can alleviate adverse effects that would otherwise be caused by a project. Without the permit condition, the adverse effects

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

Page 43

would require a conclusion that a project does not comply with the criteria at issue. With a permit condition that alleviates the adverse effect, a permit may be granted.

Ultimately, any condition imposed must be reasonable. In re Denio, 158 Vt. 230, 240 (1992); Re: Charles and Barbara Bickford, #5 W1186-EB, Findings of Fact, Conclusions of Law, and Order at 24, (May 22, 1995)[EB #595]; Re: Taft Corners Associates, Inc., #4C0696- 11 -EB (Remand), Memorandum of Decision at 18 (May 5, 1995)[EB #532R2M2]; Re: Crushed Rock, Inc. and Pike Industries, #1R0489-4-EB, Findings of Fact, Conclusions of Law, and Order at 25 (Feb. 18, 1994)[EB #572]. The Board will issue a permit with the following condition.

OMYA is currently allowed to operate its trucks between **the hours** of 6:00 a.m. and 8:00 p.m. OMYA has agreed that during the hours of 3:30 p.m. and 5:00 p.m., the peak traffic hours in **Brandon**, it will limit its truck traffic to a total of 21 round trips. OMYA's truck drivers also take a half-hour lunch

Based on the December 11, 1998 **traffic count**, the total truck trips from all sources is 907 trucks. If OMYA were to be granted its requested increase of 85 additional round trip truck trips per day (170 round trips total), OMYA trucks would represent 40% of all trucks traveling through **Brandon**, rather than the current level of approximately 25%. On average, one OMYA truck would travel through **Brandon** less than every two and one-half minutes in contrast to the current authorized average of one truck every four and three-quarter minutes, ie. double the frequency.

OMYA states that it currently operates at a rate of 98 round trip truck trips per day. Thirty round trips added to the existing authorized 85 round trips yields 115 round trips in the thirteen and one-half hour period between 6:00 am. and 8:00 p.m. (allowing one-half hour for lunch). If the 115 round trips are distributed evenly over this 8 10 minute period, then OMYA would operate up to one one-way truck trip every three and one-half minutes (17 one-way trips per hour) rather than the current level of one truck trip every four and three-quarter minutes. OMYA has not demonstrated an immediate need for the requested additional truck trips and has not fully explored the feasibility of the alternatives available to it. As a result, the Board concludes that a total of 115 round trips per day (an additional 30 round trips) is at the upper limit of what is acceptable under Criterion 8, but that the requested increase to 170 round trips (an additional 85 round trips) would unduly exacerbate the current situation.

This number is acceptable under Criterion 8 because it distributes the truck traffic in such a way that it will blend in with the existing truck traffic and with the existing nature of **Brandon Village**. It is imperative that the quality of life in historic, densely

populated villages be supported and enhanced- A fundamental purpose of Act 250 is to support the value that villages be attractive places to live and work, and that the quality of life in these villages not be unduly eroded. To allow anything that would further degrade the quality of life in Brandon would be to undermine the efforts being made to enhance Brandon's downtown. Fundamentally, this permitted amount is a compromise between Brandon Village's aesthetic and historic character and the presence of Route 7.

G. Issue 7 - Criterion 9(K) (public investments)

Criterion 9(K) protects the public or quasi-public investment in "governmental and public utility facilities, services, and lands." The criterion also protects the function, safety and efficiency of such facilities, services, and lands, as well as the public use or enjoyment of them and access to them. The burden of proof is on OMYA. The statute provides:

A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

10 V.S.A. § 6086(a)(9)(K).

The Board conducts two separate inquiries under Criterion 9(K) with respect to governmental and public facilities.

First, the Board examines whether a proposed project will unnecessarily or unreasonably endanger the public investment in such facilities.

Second, the Board examines whether a proposed project will materially jeopardize or interfere with (a) the function, efficiency or Safety of such facilities or (b) the public's use or enjoyment of or access to such facilities. Re: Munson Earth-Moving Corp., #4C09886-EB. Findings of Fact, Conclusions of Law, and Order at 11 (Apr. 4, 1997)[EB

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

Page 45

#660]; Re: Swain Development Corp., #3 W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 33 (Aug. 10, 1990)[EB #430].

Criterion 9(K) has long been construed to include roads. In this regard, Criterion 9(K) examines much of the same issues that are present in Criterion 5. For **example**, in Re: L & S Associates, #2W0434-8-EB (Revised), Findings of Fact, Conclusions of Law, and Order at 49 (Sept. 22, 1993)[EB #557], the Board concluded that Putney Road in Brattleboro is a public facility within the meaning of Criterion 9(K).

For the reasons set forth under Criterion 5, the Board concludes that the increase in truck **traffic** authorized under Criterion 8 satisfies Criterion 9(K).

The Board also concludes that Brandon's historic district and the privately owned buildings within the district which are historic, do not qualify as "governmental or public utility facilities, services, or lands" within the meaning of Criterion 9(K).

In Re: St. Albans Group and Wal*Mart Stores, Inc., #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) at 54 (June 27, 1995)[EB #598R2], the Board rejected the contention that buildings and structures qualify under Criterion 9(K) because public **funds** have been invested in them. Rather, the Board stated, that public funds may be invested in many private structures or enterprises. The Board continued:

It is true that Criterion 9(K) includes, in its examples of "governmental or public utility facility, service, or land," potentially private enterprises such as universities or hospitals. Based on the evidence, the Board is not persuaded that the City's historic district is analogous to the examples given in Criterion 9(K). The Board notes that the **loss** of public funds invested in the district, caused by negative impacts of the proposed project on the City's downtown, is relevant under other criteria such as Criterion 9(H).

Id.

Likewise, the increase in truck traffic and its effect on historic sites is determined under Criterion 8. Because Criterion 8 specifically covers this concern, the Board declines, at least in this case at this time, to introduce the issue of historic sites into its Criterion 9(K) analysis.

OMYA, Inc. and Foster Brothers Farm, Inc.

#9A0107-2-EB

Findings of Fact, Conclusions of Law, and Order

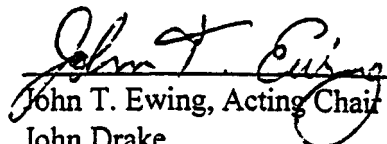
Page 46

VI. ORDER

Land Use Permit #9A0107-2-EB is hereby issued. Jurisdiction is returned to the District #9 Environmental Commission.

Dated at Montpelier, Vermont, this 25th day of May, 1999.

ENVIRONMENTAL BOARD**


John T. Ewing, Acting Chair
John Drake
Samuel Lloyd
Rebecca M. Nawrath
Alice N. Olenick

Dissenting Opinion of Board Member W. William Martinez
and Alternate Board Member Arthur Gibb:

We dissent **from** the Board's decision. While we feel that the increase sought, in relation to existing truck traffic volumes, would be excessive, we believe that a greater increase above what the decision authorizes would be acceptable under Act 250.

** Board Chair Marcy **Harding** and Board Members George Holland and Robert H. Opel did not participate in this proceeding. Board Member W. William Martinez did **not** participate in the January 29, 1999 deliberations. Board Member John Drake did not **participate** in the May 19, 1999 deliberations but he reviewed and concurs with the decision as issued.